STATE OF MICHIGAN

COURT OF APPEALS

GERALD MCKENZIE, Plaintiff-Appellant,	UNPUBLISHED September 18, 2018
v	No. 340468 Court of Claims
STATE OF MICHIGAN, Defendant-Appellee.	LC No. 17-000187-MZ

Before: O'CONNELL, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Plaintiff, Gerald McKenzie, appeals as of right an order of the Court of Claims granting summary disposition in favor of defendant, the State of Michigan, pursuant to MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact). The Court of Claims dismissed McKenzie's claim under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*. We affirm.

I. BACKGROUND

McKenzie was convicted in 1984 of assault with intent to murder for the attempted murder of his girlfriend's three-year-old daughter. Following a lengthy and unsuccessful appeal process in state and federal court, McKenzie asked the United States Court of Appeals for the Sixth Circuit for permission to file a successive habeas petition to present claims of ineffective assistance of counsel and insufficient evidence. *McKenzie v Smith*, 326 F3d 721, 724-726 (CA 6, 2003). The Sixth Circuit ruled that these claims should proceed "to avoid a potential miscarriage of justice." *Id*. at 725-726. The district court then denied McKenzie's petition. *Id*. at 726. The Sixth Circuit reversed and remanded for the district court to issue a writ of habeas corpus because McKenzie's conviction was not supported by substantial and competent evidence. *Id*. at 726-729.

II. ANALYSIS

We review a trial court's ruling on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is proper when the opposing party has failed to state a claim, MCR 2.116(C)(8), or when no genuine issue of material fact remains, MCR 2.116(C)(10). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint[,]" *Maiden*, 461 Mich at 119, while "a motion under MCR

2.116(C)(10) tests the factual sufficiency of the complaint," *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012).

A plaintiff is eligible for compensation for wrongful imprisonment if the plaintiff proves the following three requirements by clear and convincing evidence:

> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. . . .
>
> (c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial. [MCL 691.1755(1).]

"New evidence" is defined as "any evidence that was not presented in the proceedings leading to plaintiff's conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff's conviction." MCL 691.1752(b).

In this case, the Court of Claims correctly determined that McKenzie could not establish by clear and convincing evidence that his conviction was vacated on the basis of "new evidence." The Sixth Circuit based its ruling solely on the insufficiency of the evidence admitted at McKenzie's trial. *McKenzie*, 326 F3d at 727-728. Contrary to McKenzie's contention, the Sixth Circuit's brief reference to evidence that was not admitted at trial was not germane to its ruling on the sufficiency of the evidence. Rather, the Sixth Circuit expressed concern about the trial court's determination to admit one out-of-court statement that incriminated McKenzie and to exclude another out-of-court statement that implicated another potential perpetrator. *Id*. at 728. The Sixth Circuit was also troubled by trial counsel's failure to challenge these evidentiary questions. *Id*. Nonetheless, the Sixth Circuit declined to rule on these issues. *Id*. The Sixth Circuit also determined that it was unnecessary to consider the excluded out-of-court statement to analyze the sufficiency of the evidence. *Id*. Accordingly, the only evidence pertinent to the Sixth Circuit's ruling was the evidence presented at trial, which does not fall within the definition of "new evidence." Consequently, the vacation of McKenzie's conviction did not meet the statutory requirements for compensation.

McKenzie argues that his conviction was vacated on the basis of new evidence because the Sixth Circuit applied the "gateway" standard stated in *Schlup v Delo*, 513 US 298; 115 S Ct

851; 130 L Ed 2d 808 (1995), to allow McKenzie's successive habeas corpus claim to proceed. That standard permitted the consideration of evidence not presented at the criminal trial to prove the defendant's actual innocence in a habeas proceeding.[1] *Id*. at 326-329. Although the Sixth Circuit cited this standard when it allowed McKenzie to file a successive habeas petition, *McKenzie*, 326 F3d at 726, the Sixth Circuit did not rely on any such evidence when it ordered the grant of habeas relief. Therefore, the Sixth Circuit did not consider any "new evidence" as defined in MCL 691.1752(b), and McKenzie's WICA claim fails.

We affirm.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto

[1] The standard articulated in 28 US 2244 now governs the filing of a successive habeas petition.